

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

WILLIAM A. SMITH and JOSE
LEMUS,

Plaintiff(s),

v.

PACIFIC GAS AND ELECTRIC
COMPANY,

Defendant(s).

No. C07-2126 JSW (BZ)

FOURTH DISCOVERY ORDER

Following a meet and confer session in my courtroom, I ordered defendant to review and revise its privilege log in light of my comments and to lodge a copy of the privilege log, as well as any documents it contends are privileged, for an *in camera* review. Upon consideration of the documents and defendant's arguments for privilege and privacy, **IT IS HEREBY ORDERED** that:

1. Defendant shall produce documents pursuant to this order by no later than **Friday, June 13, 2008**, if they are being withheld solely on the grounds of privilege and privacy. This Order does not address any other objections defendant may

1 have asserted.

2 2. Third Party Privacy

3 Defendant's objections to the production of documents in
4 Privilege Log numbers **2**, **4**, and **5** on the ground of third party
5 privacy are **DENIED**. The individuals' privacy interests can be
6 protected by redacting the personal information listed in the
7 documents, except for age. They shall be disclosed pursuant
8 to an "Attorneys Eyes Only" protective order.

9 Defendant also objects on the grounds of privacy to the
10 production of application materials and interview evaluations
11 for unsuccessful candidates for the positions for which
12 plaintiffs applied. Defendant asserts that the cover letters,
13 resumes, interview questions and answers, and evaluators'
14 notes include "identifying and private information." It does
15 not appear that all the information contained in the documents
16 constitutes private information that should not be produced.

17 Defendant's objections to the production of privilege log
18 documents **6** and **7** are **DENIED**. Again, the individual's privacy
19 interests can be protected by redacting personal information,
20 except age, and producing the documents pursuant to an
21 "Attorneys Eyes Only" protective order.

22 3. Attorney-Client Privilege/Work Product Doctrine:

23 The attorney-client privilege protects confidential
24 communications between lawyers and their clients made for the
25 purpose of securing legal advice. "The rule which places the
26 seal of secrecy upon communications between client and
27 attorney is founded upon the necessity, in the interest and
28 administration of justice, of the aid of persons having

1 knowledge of the law and skilled in its practice, which
2 assistance can only be safely and readily availed of when free
3 from the consequences or the apprehension of disclosure."
4 Hunt v. Blackburn, 128 U.S. 464, 470 (1888). "Ordinarily the
5 compelled disclosure of an attorney's communications or advice
6 to the client will effectively reveal the substance of the
7 client's confidential communication to the attorney. To
8 prevent this result, the privilege normally extends both to
9 the substance of the client's communication as well as the
10 attorney's advice in response thereto." Matter of Fischel,
11 557 F.2d 209, 211 (9th Cir. 1977). Employee's communications
12 with in-house counsel that are made in scope of the employee's
13 duties for the purpose of securing legal advice are protected
14 by the attorney-client privilege. Upjohn Co. v. U.S., 449
15 U.S. 383, 394 (1981).

16 Pursuant to Federal Rule of Civil Procedure 26(b)(3) "a
17 party may not discover documents and tangible things that are
18 prepared in anticipation of litigation or for trial by or for
19 another party or its representative (including the other
20 party's attorney, consultant, surety, indemnitor, insurer, or
21 agent)." The work product doctrine protects "material
22 prepared by agents for the attorney as well as those prepared
23 by the attorney himself." U.S. v. Nobles, 422 U.S. 225, 238 -
24 39 (1975).

25 Defendant has the burden of establishing that the
26 attorney-client privilege applies. U.S. v. Plache, 913 F.2d
27 1375, 1379 (9th Cir. 1990). Similarly, "the party asserting
28 the protection of the work-product doctrine bears the burden

1 of proof." S.E.C. v. Beacon Hill Asset Mgmt. LLC, 231 F.R.D.
2 134, 139 (S.D.N.Y. 2004); *citing In re Grand Jury Subpoena*
3 Dated December 19, 1978, 599 F.2d 504, 510 (2d Cir. 1979).

4 During the meet and confer conference, I directed defendant to
5 amend its privilege log to sufficiently set forth the grounds
6 on which it was claiming privilege. Nevertheless, defendant's
7 log merely sets forth general assertions that the
8 communications contained in the documents are privileged and
9 that communications were made in anticipation of litigation.

10 Defendant's objection to the production of Privilege Log
11 number 3 is **GRANTED, IN PART**. The portion of the email
12 exchange that sets forth legal advice from defendant's in-
13 house counsel is protected by the attorney-client privilege;
14 however, the remainder is not privileged. Defendant shall
15 produce the document redacting the portion of the email
16 reflecting the advice of in-house counsel.

17 Defendant's objections to the production of documents in
18 Privilege Log numbers 8, 9, and 10 are **DENIED** because the
19 documents do not reflect conversations providing or seeking
20 legal advice from counsel; nor do they constitute work
21 product. For example, the email contained in Privilege Log
22 number 9 is from Ms. Toussaint, defendant's HR Supervisor for
23 EEO/ER Investigations, informing various employees that
24 plaintiff Smith's EEOC complaint was closed. The email was
25 copied to one of defendant's in-house counsel. Defendant
26 contends the document is protected by the attorney-client
27 privilege because it is a "[c]onfidential communication to
28 attorney advising as to status of matter, made in anticipation

1 of litigation." Defendant does not contend that Ms. Toussaint
2 was seeking legal advice or that the correspondence was
3 prepared by defendant's attorney (or the attorney's agent) in
4 anticipation of litigation. Moreover, the email was not
5 directed to the in-house counsel, instead the attorney was
6 merely copied on the email. "What would otherwise be routine,
7 non-privileged communications between corporate officers or
8 employees transacting the general business of the company do
9 not attain privileged status solely because in-house or
10 outside counsel is 'copied in' on correspondence or
11 memoranda." Kintera, Inc. v. Convio, Inc., 219 F.R.D. 503,
12 515 (S.D.Cal. 2003); *quoting* F.C. Cycles Int'l, Inc. v. Fila
13 Sport, S.p.A., 184 F.R.D. 64, 71-72 (D.Md. 1998). Incidental
14 communications that are copied to an attorney are not
15 protected by the attorney-client privilege. Cont'l Ill. Nat.
16 Bank and Trust Co. of Chicago v. Indem. Ins. Co. of N. Am.,
17 1989 WL 135203, *3 (N.D.Ill. 1989) (carbon copied
18 communication is not privileged when it "is not primarily
19 directed to an attorney, nor does it seek legal advice");
20 Yurick ex rel. Yurick v. Liberty Mut. Ins. Co., 201 F.R.D.
21 465, 471 (D. Ariz. 2001).

22 5. Attorney-Client Privilege re: Consultant Hired to
23 Assist Defendant with Investigation:

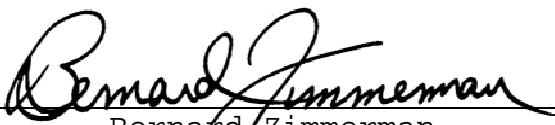
24 Defendant hired Bashen Consulting, an outside group, "to
25 perform an investigation in anticipation of litigation." As
26 noted supra, the work-product doctrine applies to documents
27 created in the anticipation of litigation by an investigator
28 working for an attorney. Nobles, 422 U.S. at 239 (1975); In

1 re Grand Jury Subpoena (Mark Torf/Torf Envtl. Mgmt.), 357 F.3d
2 900, 907 (9th Cir. 2004).

3 Defendant contends that emails from, or referring to,
4 Bashen Consulting are protected by the attorney-client
5 privilege. However, those emails are not directed at counsel,
6 do not seek legal advice and do not contain advice from
7 defendant's legal counsel. Reviewing the emails, there is
8 nothing to indicate that they were prepared at the request of
9 counsel in anticipation of litigation. Thus, defendant's
10 objection to the production of Privilege Log documents **11**, **12**,
11 and **13** are **DENIED** because the emails do not fall under the
12 attorney-client privilege and are not protected under the work
13 product doctrine.

14 The Clerk is **ORDERED** to file a copy of the documents
15 submitted for *in camera* review under seal.

16 Dated: June 9, 2008

17 
18 Bernard Zimmerman
United States Magistrate Judge

19 G:\BZALL\REFS\SMITH V. PG&E\DISC4ORD.wpd
20
21
22
23
24
25
26
27
28